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No. 85-1035

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CROCKER NATIONAL BANK,
Appellant,

v.

PAUL PERDUE,
Appellee.

On Appeal from the Supreme Court of the State of California

APPELLANT'S REPLY TO MOTION TO AFFIRM OR TO DISMISS

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Appellant believes its jurisdictional statement responds to most of appellee's response. Accordingly, appellant briefly replies as follows: [1]

1. Appellee's main argument is that no provision of federal law requires that national banks impose "unconscionable fees" (Br. 5) and, thus, no conflict purportedly exists between federal and state law. Despite the clever working of appellee's argument, it seriously misstates the issue. Our argument is that the scheme of state court

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[1] Pursuant to Rule 28.1, the entities related to appellant Crocker National Bank are disclosed at page ii of our jurisdictional statement.

price regulation authorized by the decision below stands as an obstacle to the statutory duties of the Comptroller as well as other federal law. To take only one example, Congress has granted pervasive federal power to the Comptroller to review all of the service charges of a national bank (along with the rest of its operations) in order to regulate its safety and soundness (see JS 14-17). In exercising this power, the Comptroller examines NSF charges, along with other charges, to determine the bank's revenue base. The Comptroller also examines NSF charges to insure that they are high enough to "discourage customers from frequently writing checks in amounts greater than their account balances" (App. I at 83a; App. J at 91a). At the same time, the Comptroller recognizes his responsibility to "deal with instances of unacceptable pricing," *i.e.*, "unconscionably high fees," if encountered (App. I at 82a, 84a). NSF charges are thus reviewed from several perspectives.

After examiners review a national bank's service charges and make their decision whether to seek a modification of them, a state court may not, after the fact, conduct a separate review and order modification of the charges without impermissibly altering the calculus on which the federal examination is made. Such state court review and modification would necessarily supersede the Comptroller's determination and, thus, would stand as an obstacle to the Comptroller's duty to protect the safety and soundness of the national banking system. For example, if the examiners concluded that a reduction in service charges would threaten the revenue base of the bank and would encourage more NSF check-writing, the examiners might decide the fees are at an appropriate level and make no attempt to modify them. To permit a state court later to review and modify the same charges would effectively overrule the federal determination.

While such second-guessing is by itself inimical to the federal examination process, several additional factors

exacerbate the conflict. *First*, the criteria employed in the state court review authorized by the decision below are sharply different from the criteria used in the federal examination. For example, the decision below focuses on the "true value" of the service, the sophistication of the customer, the market structure, and the absence of meaningful choice, among other factors (App. A at 11a-12a). In contrast, the federal examination focuses principally on the safety and soundness of the bank, the related role of service charges in generating revenues and, absent instances of "unacceptable pricing," generally leaves the regulation of the amount of service charges to the market (App. I at 82a), an approach expressly repudiated by the court below. Although the decision below allows some of the federal factors to be considered in the state court review of service charges (App. A at 34a n.42), it is obvious that the two standards diverge and subject national banks to conflicting demands. *Second*, in light of the prohibition against disclosing federal bank examination reports, a national bank would be unable to disclose the results of the federal examination to the state court, thereby increasing the risk of conflicting commands. 12 C.F.R. 7.6025(c) (1985). *Third*, the conflict is all the greater if retroactive refunds are ordered, thereby upsetting several years of bank examinations and imposing potentially hundreds of millions of dollars in retroactive liabilities on a bank. In the present case, plaintiff seeks to recover for all NSF charges collected since 1973 by Crocker. To do so would undo the revenue base of many years of bank examinations conducted by the Comptroller with respect to Crocker's safety and soundness.

Thus, the issue is not whether federal law authorizes "unconscionable fees." Rather, it is, among other issues, whether a state may authorize its common law courts to review and to modify the service charges of a national bank in statewide class proceedings in a way that will necessarily supersede the Comptroller's own determina-

tions as to such charges. Plainly, there is room for only one regulator of the amount of such charges. Accordingly, state court regulation "stands as an obstacle" to the statutory duty of the Comptroller and must yield. *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

2. Contrary to the statement of appellee (Br. 9 n.5), the decision below conflicts with the decision in *Jacobs* v. *Citibank*, N.A., 92 A.D.2d 786, 459 N.Y.S.2d 781 (1983), *aff'd*, 61 N.Y.2d 869, 462 N.E.2d 1182 (1984). The New York Appellate Division held as follows (459 N.Y.S.2d at 783):

> It is conceded by defendant that, during certain periods, its charges exceeded those fixed by the Banking Board. However, it points out, quite correctly, that it is a federally chartered bank and thus, not subject to the strictures of the New York Banking Law. In dealing with the matters here in issue it is governed by 12 C.F.R. 7.8000 which requires only that fees charged for the services herein involved be fixed on a competitive basis and not on the basis of any agreement or understanding among banks and their officers.

The Court of Appeals affirmed, stating that "defendant, a federally chartered bank, is not subject to the fee limitations imposed by the New York State Banking Board." 462 N.E.2d at 1184. The New York courts thus held that the Comptroller's regulation (even before its 1983 amendment) governed charges set by national banks and that state law to the contrary was not applicable to national banks. This was necessarily a preemption holding since the New York Banking Law otherwise has been held to apply to national banks. *In re Powers' Will*, 124 N.Y.S.2d 277, 279 (1953).

3. Appellee argues that the Comptroller's position on preemption has changed over the years and, therefore, is not entitled to deference (Br. 12-13). Preliminarily, the extent to which the three letters cited are truly inconsist-

ent is questionable.[2] More importantly, all of the letters were written well before Congress deregulated the banking industry in 1980 and, thus, do not reflect the significant interplay between increased competition for deposits and the need, for reasons of safety and soundness, to price deposit services at market rates, as explained by the Comptroller in his formal interpretative ruling (App. I at 77a, 79a). Moreover, the letters were not formal interpretative regulations, and do not rise to the level of deliberation and care of a formal interpretative regulation, *see New York Stock Exchange* v. *Bloom*, 562 F.2d 736, 741 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 942 (1978), the latter being entitled to more deference.

Appellee also seeks to discredit (Br. 12) the Comptroller's regulation by complaining that it was issued on the eve of oral argument below. This argument was made and rejected by the California Supreme Court, which held that there is "no impropriety in an administrative agency

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[2] Although the August 22, 1977 letter (Br. 1a) states that state-imposed limitations on service charges "would not seem" to be subject to federal preemption under previous case law, the actual holding of the staff attorney's opinion was that the state legislation there in question was not intended to be applicable to national banks. Therefore, the preemption issue was not directly presented. The December 4, 1979 letter (Br. 4a) is an interpretation of a *different* interpretative ruling of the Comptroller concerning "dormant" service charges on inactive accounts. The regulation had specifically limited such charges to a "reasonable" amount. The opinion states that such reasonableness should be determined by reference to local law and, thus, incorporated local law as a guide to the reasonableness requirement. The opinion does not indicate that states may regulate the amount of *all* service charges. The November 29, 1967 letter (Br. 6a) states that a national bank may impose service charges. Nowhere in the letter is there any statement that states may regulate the amount of those charges. The only reference to state law was a statement that the Uniform Commercial Code governed the rights of a depositor in a bank with respect to refusals of the bank to honor a check and that interpretation of the UCC was a matter of state law. In sum, none of the letters holds that states may generally regulate the amount of service charges of a national bank.

issuing a regulation to clarify its position on contested issues in pending litigation" (App. A at 22a n.22).

4. Appellee erroneously states that "the bank does not provide depositors with a schedule of its services . . ." (Br. 3). Although the complaint alleges that the signature card does not identify the amount of the charge for NSF checks and that the bank does not furnish the depositor with a copy of the applicable bank "rules and regulations" (App. A at 3a), neither the complaint nor the court below stated that the bank fails to provide a schedule of service charges to customers. In fact, the decision below expressly recognized that the complaint was silent concerning whether Crocker had complied with California Financial Code §§ 865.2 and 865.4, requiring banks to make information about bank service charges available to the public in an area of the bank open to the public and requiring written advance notice of price increases to customers (App. A at 3a n.3, 5a n.6). Under California rules of pleading, therefore, it is presumed (in the absence of an allegation to the contrary) that Crocker *has* complied with the law (see JS 5 n.4). Indeed, in recognition of such disclosure, the court below indicated that Crocker had "post[ed] notice of its rates" (App. A at 5a & n.6). Moreover, plaintiff has conceded that he was aware of the amount of Crocker's NSF charges (App. C at 42a, 46a, 49a). This is thus not a case involving nondisclosure of the price term, but a case involving substantive regulation of the amount of the price term.[3]

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[3] Appellee also argues that the brief contractual language of the signature card (which is separate from the disclosure notice) was in print so small that "many" could not read it (Br. 2). Although the court below made such a statement, the signature card is not difficult to read. The photocopy attached to plaintiff's complaint was of extremely poor quality, which may have contributed to the court's comment. The reproduction of the signature card as it appears in appellee's brief (Br. 3 n.2) demonstrates that it is readily legible. At all events, the court below held that the signature card agreement is a valid contract under California law.

5. Finally, appellee is wrong in arguing that this appeal is not ripe. Appellee suggests that Crocker has not satisfied the four-factor test of *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 482-83 (1975), because appellant has "not identified any statement of . . . policy in any federal statute" (Br. 16) that would be seriously eroded by refusal to grant immediate review. As stated in our jurisdictional statement (JS 18-22) and the briefs of amici curiae (*e.g.*, American Bankers Association 4-7, 10-11; Consumer Bankers Association 4-10), the 1980 and 1982 deregulation acts rest on a congressional determination that national banks must be able to price deposit account services to recover the cost of deposits and to attract and retain those deposits in the competitive marketplace. This federal policy of reliance on market forces to price bank services finds repeated expression in the legislative history of the deregulation acts (*ibid.*) and in the Comptroller's interpretative regulation (App. I at 77a-79a, 82a). Appellee cites no authority to support its contention that a state court decision that threatens seriously to erode substantial federal policy, such as the decision below, is immune from review because the federal policy on which the appeal is based appears in the legislative history or an agency interpretation of the federal statutory scheme.

The court below repudiated the Comptroller's regulation regarding the pricing of national bank service charges. Failure to grant immediate review will seriously erode the federal policy requiring national banks to price their services in accordance with federal criteria and will force banks, at least in California, to adopt the competing criteria established by the court below. For the same reason, postponed review will erode the federal statutory policy conferring exclusively on the Comptroller the duty and power to review and to modify the financial operations of national banks to ensure their safety and sound-

ness. As noted, absent immediate review, regulation of national bank service charges will be usurped, at least in California, by the state courts.

Respectfully submitted,

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